(12)

No. 712

Supreme Court of the United States.

OCTOBER TERM, 1943.

PATRICK HENRY KELLEY, PETITIONER,

v.

THE AMERICAN SUGAR REFINING COMPANY,
RESPONDENT.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

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THE ISSUE IN THE CASE.

The substantial question presented on the complaint is a very narrow one, peculiar to New Jersey law and to corporations formed under that law prior to 1896. The corporation statutes of New Jersey until 1896 required a definite limitation to corporate life. The charter of each corporation organized under that law, consequently, contained a specified expiration date. The corporate life, however, could be extended under the New Jersey statutes for further definite periods. The respondent was organized prior to 1896 and its charter provided for expiration of the corporate existence on January 10, 1941. Appropriate action was taken within the corporation in 1940 to extend that date for fifty years. The petitioner, who is an owner of common stock of the respondent, voted against the extension. He has now sued to recover the liquidating value of his stock as of January 10, 1941. The only question, therefore, presented on the complaint is whether a

non-assenting stockholder in a pre-1896 New Jersey corporation, which votes an extension, becomes entitled to recover the liquidating value of his stock from the corporation, even though the corporate life is validly extended.

The Question Presented by the Petition for Certiorari.

The District Court dismissed the action without prejudice through an application of the rule of *forum non conveniens*. On appeal this was affirmed by the Circuit Court for the First Circuit (139 F. (2d) 79). The reasons assigned for allowance of the petition are diffuse and confusing, but apparently they can be reduced to the proposition that: Admitting that a court of equity might properly dismiss a bill through application of the doctrine of *forum non conveniens*, a District Court of the United States cannot apply that doctrine to an action which in essence is an action at law in which the right of jury trial is guaranteed by the Constitution.

The Decisions of the Lower Courts were Correct.

The Law of Massachusetts Required the Dismissal.

Prior to the institution of the action, it was settled that under the law of Massachusetts the petitioner could not prosecute an action in a Massachusetts court to recover the liquidating value of his shares under the circumstances disclosed in the complaint.

> *Kelley* v. *American Sugar Refining Company*, 311 Mass. 617.

That case was a prior attempt by this petitioner to recover on this cause of action. In view of this decision, there

could be no question that, as far as Massachusetts law is concerned, the doctrine of *forum non conveniens* applied to the facts disclosed in this case.*

The fact that the Massachusetts case was a bill in equity is wholly immaterial. Massachusetts draws no distinction between equity and law as far as application of *forum non conveniens* is concerned.

Universal Adjustment Corp. v. *Midland Bank, Ltd.*, 281 Mass. 303.

The Law Applied in the Federal Courts Likewise Required Dismissal.

Under the decisions of this Court, the District Court was required to decide the case according to Massachusetts law.

Erie Railroad v. *Tompkins*, 304 U.S. 64.
Klaxon Co. v. *Stentor Electric Mfg. Co.*, 313 U.S. 487.

In any event, there is no diversity between the Massachusetts rule and the rule followed by the Federal courts prior to the decision in the *Erie* case. This Court has applied the rule of *forum non conveniens* quite as consistently as the Supreme Judicial Court of Massachusetts.

Rogers v. *Guaranty Trust Company*, 288 U.S. 123.

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*The decision in the *Kelley* case is the last of a long line of Massachusetts cases which uniformly apply the rule in cases relating to intra-corporate disputes. See *Smith* v. *Mutual Life Insurance Company of New York*, 14 Allen, 336, 343; *New Haven Horse Nail Co.* v. *Linden Spring Co.*, 142 Mass. 349, 353; *Pierce* v. *Equitable Life Assurance Society*, 145 Mass. 56, 63; *Richardson* v. *Clinton Wall Trunk Mfg. Co.*, 181 Mass. 580, 582; *Kling* v. *McTarnahan*, 277 Mass. 386, 390; *Wason* v. *Buzzell*, 181 Mass. 338, 339; *Kimball* v. *St. Louis & San Francisco Railway*, 157 Mass. 7.

Also, like the Massachusetts court, the Federal courts do not draw a distinction between law and equity in this particular. The Federal courts applied the rule to actions at law prior to the abolition of the distinction between the two forms of procedure.

> *Heine* v. *New York Life Insurance Company*, 45 F. (2d) 426 (D.C. Ore.); 50 F. (2d) 382 (C.C.A. 9).

This lower court case was cited with complete approval by this Court in the opinion in the *Rogers* case (288 U.S. at 131).

No Constitutional Point is Involved.

The petitioner's endeavour, apparently, is to make it appear that the constitutional right to trial by jury has been denied him. This is not so. The dismissal without prejudice on grounds of *forum non conveniens* no more denies the right to trial by jury than would a similar dismissal without prejudice on grounds of improper venue. The constitutional guarantee relates to the mode of trial in a case which it is appropriate should be tried; it has nothing to do with the underlying question of whether a particular case can be prosecuted in a particular court. If the petitioner should bring his action in the District Court in the District of New Jersey, where the rule of *forum non conveniens* would not apply, he would have a clear right to a jury trial, assuming that his action really is in the nature of an action at law. But until he institutes an action in a court which is properly open to him and to that action, no question can arise as to his right to trial by jury.

Conclusion.

None of the reasons ordinarily deemed sufficient to move this Court to grant certiorari is presented in this case. There is no conflict between the Circuits. The Circuit Court of Appeals followed the Massachusetts cases and did not decide any question of local law so as to conflict with applicable local decisions. No important question of Federal law is presented which has not been settled by this Court. This Court has already settled the law relating to *forum non conveniens*. There has been no decision on any Federal question which could conflict with applicable decisions of this Court. There has been no departure from the accepted and usual course of judicial proceedings. Furthermore, the point involved in the case is one of minute application and not one of general interest in the law. The supposed constitutional question put forward by the petitioner is without substance. Indeed, the petitioner's present insistence on a jury trial would seem to be a clear afterthought, in view of the fact that, when he first sued in the state court, he saw fit to proceed on the equity side, where he could not have a jury, although he could quite as well have brought an action at law, in which Massachusetts would guarantee him a jury quite as fully as would the Federal Constitution.

The decision of the Circuit Court of Appeals was clearly right and there are substantial reasons, some of which are stated in the opinion of the Circuit Court of Appeals, why the case should not be tried outside of New Jersey. The case is not one which should move this Court to take jurisdiction, and we urge that the petition be denied.

Respectfully submitted,

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RICHARD WAIT.